A

## UNI WALL ARCHITECTURAL PRODUCTS & SERVICES SDN BHD

**v.**

B

## GLOBAL UPLINE SDN BHD (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG JC
[SUIT NO: D-22-1531-2009]
30 MAY 2011

C

***CIVIL PROCEDURE:*** *Judgments and orders - Ex parte order - Application for extension of time - Whether could be made by ex parte summons - Whether there are provisions which allows applications for extension of time - Whether grant of ex parte extension of time would*
D *prejudice plaintiff - Whether there were sufficient reasons for delay - Whether order irregularly obtained and lacked merits - Whether order a nullity*

***CIVIL PROCEDURE:*** *Judgments and orders - Ex parte order - Setting aside writ and stay of proceedings - Whether there were reasons*
E *to justify stay of proceedings - Rules of the High Court 1980, O. 12 r. 6 - Whether applicable - Whether order irregularly obtained and lacked merits - Whether order a nullity*

The plaintiff had issued a writ and statement of claims against the
F defendant for the sum of RM1,500,000 being the amount on a Bank Muamalat cheque given by the defendant which was dishonoured. The plaintiff commenced its action in the Kuala Lumpur High Court. The defendant applied *ex parte* for a conditional appearance to be entered and also for leave to apply
G to set aside the writ and/or the service of it. The SAR had, by an *ex parte* order, allowed the defendant leave to enter conditional appearance with respect to the writ filed and that the defendant had been given 30 days from the date of the order to file its application to set aside the writ. However, the application of the
H defendant to set aside the writ thereof could not be filed on time and so *vide* encl. 8, the defendant applied *ex parte* for extension of time. The SAR gave the order for the said extension. A stay of all proceedings against the defendant was also ordered. The plaintiff, being unhappy with the said decision of the SAR made
I *ex parte* had by its summons in chambers applied to set aside the said order and for a further prayer to strike out the defendant's

application to set aside the writ thereof. The SAR allowed the plaintiff's application. By way of encl. 31, the defendant appealed. The issue that arose was whether an *ex parte* order made by the SAR in giving leave to the defendant to enter a conditional appearance and to within 30 days of the order to apply to set aside the writ and/or the service of it, could be extended *ex parte* by a subsequent application by the defendant.

**Held (dismissing defendant's appeal):**

**(1)** The general rule is that all applications in chambers have to be made by summons *inter parte* other than applications specifically excluded by the rules from being so brought. Accordingly, there not being any provision anywhere which allows applications for extension of time to be made by an *ex parte* summons, having heard the application as an *ex parte* application was hearing the application by procedure independent of the Rules of the High Court 1980 and as such the order was a nullity. (paras 19 & 21)

**(2)** There is no reference to the fact that an extension of time to file an application to set aside a writ and/or the service thereof may be made *ex parte*. In any event, even if it could be made *ex parte*, O. 32 r. 6 RHC provides that the court may set aside an order made *ex parte*. Further, reasons for the extension of time given by the defendant was not *bona fide* and the delay had not been sufficiently explained. Moreover, to grant an *ex parte* extension of time to the defendant to file its application to set aside the writ and/or service of it would prejudice the plaintiff. (paras 25, 28 & 29)

**(3)** The defendant stated in its affidavit that as it was applying to set aside the writ and/or the service of it then further proceedings ought to be stayed. That by itself was not a sufficiently substantive reason for a stay of proceedings. For so long as the appearance remained conditional, no further steps in the proceedings could be taken by the plaintiff as there was no obligation to enter defence until the appearance becomes unconditional. Likewise too the plaintiff could not apply for summary judgment until the appearance becomes

unconditional. The plaintiff could not enter judgment in default of appearance or defence against the defendant and neither could the plaintiff file an application for summary judgment. There was therefore nothing that the defendant needed to fear that would justify a stay of proceedings against the defendant. No stay of proceedings should have been ordered by the SAR either under O. 12 r. 6 or 7 RHC or even under the inherent jurisdiction of the court. (para 42)

**(4)** The *ex parte* order of the SAR (encl. 11) that contained not just an extension of time for the defendant to file its application to set aside the writ and/or the service of it but also a stay of all proceedings against the defendant ought to be set aside. The said impugned order made *ex parte* by the SAR was irregularly obtained and in any event the application lacked merits. The SAR was right in setting aside the whole of the said order. (para 44)

**Case(s) referred to:**

*Bank Utama (Malaysia) Bhd v. Hectares Pacific Sdn Bhd & Ors [2003] 8 CLJ 86 HC* ***(refd)***

*Keymer v. Reddy [1912] 1 KB 215* ***(refd)***

*Malayan United Finance Bhd, Johore Bahru v. Liew Yet Lan [1989] 1 LNS 115 HC* ***(refd)***

*Munusamy Karuppiah v. Sang Lee Company Sdn Bhd & Ors [2010] 3 CLJ 924 CA* ***(refd)***

*President Hotel Sdn Bhd v. Datuk Bandar & Anor And Crest Trading Sdn Bhd (Intervener) [1995] 1 LNS 167 HC* ***(refd)***

*Sing Lian Express Sdn Bhd v. Soh Kim Tee [1974] 1 LNS 156 HC* ***(refd)***

*Tan Poey Kheng v. Ma Peng Kiat [1983] 1 LNS 56 HC*

*Uniwall Architectural Products & Services Sdn Bhd v. Global Upline Sdn Bhd [2010] MLJU 1591* ***(refd)***

**Legislation referred to:**

National Land Code 1965, s. 326(2)

Rules of the High Court 1980, O. 12 rr. 6(1), 7(1), O. 32 r. 6, O. 53

*For the plaintiff/respondent - CJ Siew; M/s Douglas Yee*

*For the defendant/appellant - Azad Bashir; M/s Shafee & Co*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Lee Swee Seng JC:**

### Prologue

**[1]** This judgment deals with the question as to whether an *ex parte* order made by the Senior Assistant Registrar (SAR) in giving leave to the defendant to enter a conditional appearance and to within 30 days of the order to apply to set aside the writ and/or the service of it, can be extended *ex parte* by a subsequent application by the defendant.

**[2]** It is to be noted that the order made *ex parte* also contained an order for a stay of all proceedings against the defendant until the final disposal and determination of the defendant's application to set aside the writ and/or the service of it.

### Parties

**[3]** The plaintiff had issued a writ and statement of claims against the defendant for the sum of RM1,500,000 being the amount on a Bank Muamalat cheque given by the defendant which was dishonoured upon presentation and due notice of dishonour had been given to the defendant. As the cheque was dishonoured in Kuala Lumpur when the plaintiff presented it for payment at its bank, HSBC in Kuala Lumpur, the plaintiff had commenced its action in the Kuala Lumpur High Court.

**[4]** The writ had inadvertently stated that entry of appearance was eight days when it should have been 20 days as the writ and statement of claim was served on the defendant at its registered office in Kuching, Sarawak.

**[5]** The defendant therefore applied *ex parte* for a conditional appearance to be entered and also for leave to apply to set aside the writ and/or the service of it.

### Problem

**[6]** The SAR had by an *ex parte* order dated 20 November 2009 allowed the defendant leave to enter conditional appearance with respect to the writ filed and that the defendant had been given 30 days from the date of the order to file its application to set aside the writ and/or service thereof. It was further ordered that

all proceedings be stayed until the final disposal and determination of the defendant's application to set aside the writ and/or the service thereof.

**[7]** However, the application of the defendant to set aside the writ and/or the service thereof could not be filed on time and so *vide* encl. 8 the defendant applied *ex parte* for extension of time until 29 January 2010 for the said filing. The defendant further prayed for stay of all proceedings against the defendant until the final disposal and determination of the defendant's application to set aside the writ and/or the service of it. What is more unusual was that the defendant also prayed for costs of the application to be borne by the plaintiff.

**[8]** The SAR gave the order (encl. 11) for the said extension on 15 December 2009. A stay of all proceedings against the defendant was also ordered as well as costs of the application to be borne by the plaintiff.

**[9]** The plaintiff being unhappy with the said decision of the SAR made *ex parte* had by its summons in chambers dated 25 February 2010 (encl. 17) applied to set aside the said order of 15 December 2009 and for a further prayer to strike out the defendant's application filed on 29 January 2010 (encl. 13) to set aside the writ and/or the service thereof. The SAR agreed with the plaintiff and allowed the plaintiff's application.

## Prayer

**[10]** By way of encl. 31, the defendant appealed to the judge in chambers against the decision of the SAR on 13 January 2011 in allowing the plaintiff's application in encl. 17 *inter alia* to set aside the *ex parte* order dated 15 December 2009 wherein the SAR had *inter alia* allowed the defendant an extension of time until 29 January 2010 to file an application to set aside the writ and/or the service thereof.

## Principle

**[11]** The Conditional Appearance entered by the defendant on 20 November 2009 has an endorsement that reads:

> This appearance is to stand as unconditional unless the Defendant applies within 30 days to set aside the Writ and Statement of Claim and obtain an order to that effect.

**[12]** Indeed Practice Note No. 4 of 1980 on 'Leave for Conditional Appearance O. 12 r. 6(1) Rules of the High Court 1980' states that the leave must specify the time within which the application to set aside the writ or the service of it must be issued.

**[13]** That being the case the last day for the defendant to apply to set aside the writ was on 19 December 2009.

**[14]** The plaintiff's solicitors were more than surprised when they were served on or about 2 February 2010 with an application dated 29 January 2010 (encl. 13) to set aside the writ and the service thereof and an *ex parte* order of court dated 15 December 2010 (encl. 11) for an order to extend time to file encl. 13 until 29 January 2010.

**[15]** The plaintiff's solicitors requested for the relevant cause papers from the defendant's solicitors and it was then that the plaintiff's solicitors realised that the defendant's solicitors had applied *ex parte* to extend time to file their application to set aside the writ and/or the service thereof *vide* encl. 8 on 15 December 2009.

**[16]** The plaintiff's counsel, Mr CJ Siew, submitted that the procedure of applying *ex parte* for an extension of time to file the application to set aside the writ and/or the service of it to 29 January 2010 is an abuse of the court's process.

**[17]** Plaintiff's counsel Mr CJ Siew highlighted the reasons given by the defendant in applying for extension of time from 20 December 2009 to 29 January 2010, an extension of 41 days as follows:

(a) The defendant's solicitors experienced difficulties in obtaining invoices and relevant documents on the project and also particulars of the defendant's bank account to support the application;

(b) The defendant's solicitors had no opportunity to discuss and/or interview the executives and/or directors of the defendant involved in the case to understand the case.

**[18]** The plaintiff's counsel submitted that there was nothing in the affidavit in support (encl. 12) that alluded to the situation of the case and neither was there any reference to any invoices or

bank account documents. In fact, all the matters referred to in the defendant's affidavit in support were legal arguments. A closer perusal of the exhibits revealed three exhibits which were already in the possession of the defendant:

(a) Exhibit LYY1: Letter from the plaintiff's solicitors dated 19 October 2009 serving the sealed writ and statement of claim on the defendant;

(b) Exhibit LYY2: Company search from SSM of the plaintiff dated 16 November 2009;

(c) Exhibit LYY3: Letter from the plaintiff to the defendant dated 19 January 2009 giving notice to the defendant of the dishonoured Bank Muamalat cheque dated 2 December 2008 for the sum of RM1,500,000.

**[19]** The plaintiff expressed its disbelief that these documents could not be made available to the defendant's solicitors within 30 days which was the time frame given to them to set aside the Writ and/or the service of it. Actually under O. 12 r. 7(1) RHC the defendant is only given 14 days to apply to set aside the writ and/or the service of it.

**[20]** I would readily agree with the plaintiff's argument that the reasons given for extension of time were not valid reasons. One knows what is required for setting aside the writ and/or the service of it. It is never about the merits of the case. It is about something being defective in the writ and/or the service of it. Little wonder that there was no need to ask for an exhibit of the so-called relevant invoices. It is more a legal argument and not about a substantive argument on the merits of the case.

**[21]** On the issue as to whether an application of this nature can be made *ex parte* we have guidance from the case of *Malayan United Finance Bhd, Johore Bahru v. Liew Yet Lan* [1989] 1 LNS 115; [1990] 1 MLJ 317, where his Lordship VC George (as he was then) opined at pp. 319-320:

> Order 32 r 1 provides that except as provided by O 25 r 7, every application in chambers must be by summons in Form 62 which form it is to be noted has reference to all parties concerned, *viz*:
>
> that all parties concerned attend before the judge (or registrar) ...

The prescribed endorsements in the form after the signature of the issuing registrar are as follows:

> This summons is taken out by the plaintiff (or as may be) of (state address)
>
> To the defendant (or as may be).

The said O. 25 r. 7 provides only one exception which is an application for directions in certain cases which can be made not by summons but by notice.

Order 29 deals with applications for interlocutory injunctions and Rule 1(2) provides that, where the applicant for the interlocutory injunction is the plaintiff and there is urgency 'such application may be made *ex parte* by summons supported by affidavit but, except as aforesaid, such applications must be made by summons'.

Order 49 r. 2 specifically provides that an application for a garnishee order nisi must be made *ex parte* by summons. Similarly, it is specifically prescribed by O. 52 r. 2(2) that an application for leave to apply for an order for committal must be made *ex parte* to the court.

What is to be gleaned from this is that the policy and effect of the above rules is that the general rule is that all applications in chambers have to be made by summons *inter parte* other than applications specifically excluded by the rules from being so brought. Accordingly, there not being any provision anywhere which allows applications for extension of time to be made by an *ex parte* summons, it is my view that having encl. 61 heard as an *ex parte* application was hearing the application by procedure independent of the Rules of High Court 1980 and as such the order made is a nullity - see *Anlaby & Ors v. Pretorius* [1888] 20 QBD 764 at pp. 769-771 and *Syarikat Joo Seng & Anor v. Habib Bank Bhd* [1986] 2 MLJ 129 at p 131.

**[22]** To all those instances referred to above where an *ex parte* procedure is specifically provided for, one may add 'Practice Note No. 4 of 1980' on 'Leave for Conditional Appearance O. 12 r. 6(1) Rules of the High Court 1980' where it is expressly provided that because of the urgency of the matter with respect to time frame to enter a conditional appearance, the application for leave should normally be made *ex parte* to a Registrar in Chambers.

**[23]** By way of analogy one may liken the application for extension of time here to a case where leave to apply for *certiorari* is applied for *ex parte* under O. 53 RHC and whether an extension of time can be applied for *ex parte* to file the leave application. In *President Hotel Sdn Bhd v. Datuk Bandar & Anor And Crest Trading Sdn Bhd (Intervener)* [1995] 1 LNS 167; [1995] 4 MLJ 517 at p. 522, his Lordship Low Hop Bing JC (as he was then) reasoned as follows:

> As a general rule, an application for leave to issue *certiorari* pursuant to O. 53 r. 1(2) may be made *ex parte*. However, an application for extension of time beyond the six-week period under r. 1A is, by practice, to be made *inter partes*. In the Supreme Court Practice 1979 Vol 1 p 831 para 53/1-14/23, it was stated as follows:
>
> The court may extend the time under O. 3 r. 5 (and see R v. LCC 141 LT 590), but will only do so where a strong case for it is shown. Notice of the application must be given to the person who will be respondent to the motion (*R v. Ashford, Kent JJ, ex p Richley* [1955] 1 WLR 562).
>
> This practice was applied in order that the respondent may be heard on the question whether or not it is a fit case in which to extend the time.
>
> As the applicants' application *vide* encl. 2 is made *ex parte*, the applicant has failed to give notice to the respondent or the intervener (who is the person most affected by the application) of its application to extend time to challenge the development order. The *ex parte* order for extension of time is therefore obtained irregularly and should be set aside *ex debito justitiae* (see *Craig v. Kanssen* [1943] KB 256; [1943] 1 All ER 108).

**[24]** These days with advancement in computer technology and powerful search engine one can easily determine with exactitude the number of times references to '*ex parte*' are made in the Rules of the High Court 1980 (RHC) and a quick search in either www.lexis.com/my/legal or www.cljlaw.com under 'Legislation' and under 'Rules of the High Court 1980' would show the following references where either the word '*ex parte*' appears or a reference to an '*ex parte* application' is made:

> Order 6. Writs of Summons: General Provisions.
>
> Order 7. Originating Summonses: General Provisions.
>
> Order 8. Originating and other Motions: General Provisions.

Order 10. Service of Originating Process: General Provisions.

Order 12. Entry of Appearance to Writ or Originating Summons.

Order 15. Causes of Action, Counterclaims and Parties.

Order 16. Third Party and Similar Proceedings.

Order 20. Amendment.

Order 28. Originating Summons Procedure.

Order 29. Interlocutory Injunctions, Interim Preservation of Property, etc.

Order 30. Receivers.

Order 32. Applications and Proceedings in Chambers.

Order 38. Evidence: General.

Order 39. Evidence by Deposition: Examiners of the Court.

Order 46. Writs of Execution: General.

Order 48. Examination of Judgment Debtor, etc.

Order 49. Garnishee Proceedings.

Order 50. Charging Orders, Stop Orders, etc.

Order 52. Committal.

Order 53. Application for Judicial Review.

Order 66. Obtaining Evidence for Foreign Courts, etc.

Order 67. Reciprocal Enforcement of Judgments.

Order 70. Admiralty Proceedings.

Order 71. Non-Contentious Probate Proceedings.

Order 73. Proceedings by and against the Government.

Order 75. Distress Act 1951 (Act 255).

Order 76. Disability.

Order 85. Bills of Sale Ordinance 1950.

Order 88. Companies Act 1965.

**[25]** There is no reference to the fact that an extension of time to file an application to set aside a writ and/or the service thereof may be made *ex parte*. In any event, even if it can be made *ex parte*, O. 32 r. 6 RHC provides that:

> The Court may set aside an order made *ex parte*.

**[26]** If authority is needed one may refer to the case of *Tan Poey Kheng v. Ma Peng Kiat* [1983] 1 LNS 56 where Mohamed Dzaiddin J (as he was then) held that O. 32 r. 6 RHC provides that the court may set aside an order made *ex parte* and that this rule embodies the fundamental rule of practice that a party affected by an *ex parte* order may apply to court to discharge it, in as much as he has not had an opportunity of being heard.

**[27]** If further higher authority is needed one can refer to the Court of Appeal case of *Munusamy Karuppiah v. Sang Lee Company Sdn Bhd & Ors* [2010] 3 CLJ 924 where his Lordship Abdul Malik Ishak JCA held at p. 933:

> Order 32 r. 6 of the RHC states that the court may set aside an order made *ex parte*. This rule is a good piece of legislation because it protects the basic right of the litigants in that the party who has not been heard may apply to the court to have that order discharged forthwith (*Boyle v. Sacker* [1888] 39 Ch D 249, at p. 251; *Becker v. Noel And Another, Practice Note* [1971] 1 WLR 803, CA; and *Tan Poey Kheng v. Ma Peng Kiat* [1983] 1 LNS 56 HC). It is trite law that a judge does not become functus officio after issuing an *ex parte* order. In an originating summons procedure under O. 28 r. 4(1) of the RHC, an *ex parte* order may be varied or revoked by a subsequent order of the court on such terms as it thinks fit. According to cases like *Lee Phet Boon v. Hock Thai Finance Corp Bhd* [1994] 3 CLJ 466; and *Datuk M Kayveas v. PV Das* [1997] 4 CLJ 544, CA, an application to set aside an *ex parte* order is not an appeal and a court of co-ordinate jurisdiction may exercise the power to vary or revoke it.

**[28]** Here the plaintiff by encl. 17 had applied to set aside the *ex parte* order made by the SAR to extend time until 29 January 2010 to apply to set aside the writ and/or the service thereof. I find the reasons for the extension of time given by the defendant and as argued by its counsel Mr Azad Bashir, to be not *bona fide* and the delay have not been sufficiently explained.

**[29]** Moreover to grant an *ex parte* extension of time to the defendant to file its application to set aside the writ and/or the service of it would prejudice the plaintiff. The plaintiff having not

been served with any application to set aside the writ and/or the service of it by 19 December 2009 (the last day for the filing of such an application by the defendant) had proceeded to file an application for summary judgment in encl. 10 on 6 January 2010. The said encl. 10 and its supporting affidavit in encl. 11 were served on the defendant's solicitors on the same day.

**[30]** It was only on or about 2 February 2010 that the plaintiff's solicitors were served with the defendant's application to set aside the writ and/or the service of it (encl. 13) together with the *ex parte* order (encl. 11).

**[31]** At any rate the defendant's application to set aside the writ and/or the service of it (encl. 13) came up for hearing on 22 October 2010 before her Ladyship Amelia Tee JC and on 30 November 2010 her Ladyship had dismissed the defendant's application on merits. The grounds for her Ladyship judgment can be found in *Uniwall Architectural Products & Services Sdn Bhd v. Global Upline Sdn Bhd* [2010] MLJU 1591.

**[32]** Learned counsel for the defendant had drawn the court's attention to the case of *Keymer v. Reddy* [1912] 1 KB 215 at p. 219 where Fletcher Moulton J held:

> Therefore if he has entered an appearance under protest, whether the time fixed by the Master for applying to set aside the writ has expired or not, and if he makes an application to the Court to set aside the writ and the Court is of the opinion that the delay in making that application does not show an intention to abandon the protest, or an improper attempt to impede the administration of justice, it has the fullest power to give effect to that protest and to set aside the writ or the service ...

**[33]** That case is not a proposition that the defendant can apply *ex parte* to extend time to file its application to set aside the Writ or the service thereof. All that it says is that the court is not precluded from hearing the application even if filed out of time. Indeed as stated above her Ladyship Amelia Tee did hear the application and had dismissed it on merits.

**[34]** The learned counsel for the defendant also crutched for support of his proposition on the need for an *ex parte* application for extension of time by referring to case on an *ex parte* application to the court to extend time of notice of intended removal of a caveat in *Sing Lian Express Sdn Bhd v. Soh Kim Tee* [1974] 1 LNS 156; [1974] 2 MLJ 24 at p. 25 where his Lordship Syed Othman J observed:

> ... The court considered that it would be prejudicial to the respondent if the order was made for the service to be effected on the company, as there were a few days left before the expiry of the period of one month allowed under section 326(1)(b) of the Code for the notice of intended removal of the caveat. The circumstances clearly required that the court should act *ex parte* and the court did so ...

**[35]** However the then s. 326(2) of the National Land Code 1965 had expressly provided as follows:

> The court may, on the application of any person or body on whom such a notice has been served (and acting, if the circumstances so require, *ex parte*), from time to time extend the said period of one month; and the Registrar, on being duly served with any order of the court under this sub-section, shall not remove the caveat until the expiry of the said period as thereby extended. (emphasis added)

**[36]** It must be pointed out that when the plaintiff's application (encl. 17) to set aside the *ex parte* order came up for hearing first on 17 August 2010, the defendant had raised a preliminary objection to the effect that the hearing of encl. 17 cannot be proceeded with as there was a stay of proceedings in place and therefore encl. 13 must be disposed of before encl. 17.

**[37]** Not only had the defendant applied for the extension of time to 29 January 2010 to file its application to set aside the writ and/or the service of it but also that the whole proceedings be stayed until the final disposal and determination of the defendant's application to set aside the writ and/or the service ought to be set aside. The application for stay is made under O. 12 r. 6 and 7 RHC.

**[38]** There are sound authorities for stating that there is no provision under O. 12 r. 7 RHC for the court to order a stay of proceedings. In *Bank Utama (Malaysia) Bhd v. Hectares Pacific Sdn Bhd & Ors* [2003] 8 CLJ 86 at p. 105, his Lordship Clement Skinner J (as he then was) observed:

> It is the plaintiff's contention that the order of stay was improperly obtained by the second defendant because (a) it was obtained on an *ex parte* basis under O. 12 r. 7 RHC which rule does not provide for or authorise the grant of a stay of proceedings, let alone on an *ex parte* basis (the first ground), and (b) on the facts disclosed in the second defendant's application, there were no

grounds upon which the inherent jurisdiction of the court under O. 92 r. 4 RHC could be prayed in aid of an order for stay of proceedings. A

With reference to the first ground, the plaintiff referred me to three cases where the High Court discussed the scope of O. 12 r. 7 RHC. In *Tai Choi Yu v. The Government of Malaysia* [1993] 3 CLJ 405 his Lordship Richard Malanjum JC (as he then was) expressed the view that an application made under O. 12 r. 7 RHC ought to be an application "either to set aside the writ, the service of the writ or notice of the writ or to declare that the writ and notice has not been duly served." In other words, an order for stay may not be applied for or obtained under O. 12 r. 7 RHC. A similar view was expressed by Kamalanathan Ratnam J in *Trans Resources Corporation Sdn Bhd v. Sanwell Corporation & Anor (No 2)* [1999] 3 CLJ 215. In *Matchplan (M) Sdn Bhd & Anor v. William D Sinrich & Anor* [2000] 7 CLJ 212 the same learned Judge exercised his jurisdiction to set aside the action before him instead of staying it "since O. 12 r. 7 of the RHC does not provide for a stay". B C D

I think that it is quite clear from the decision in the above three cases that O. 12 r. 7 RHC may not be resorted to by a defendant to obtain a stay of proceedings because the rule itself prescribes the purposes for which it may be used and a stay of proceeding is not one of them. Therefore, if the second defendant had obtained his order for stay under O. 12 r. 7 RHC I would have no hesitation in saying that the order for stay had been improperly obtained ... E F

**[39]** There is yet another argument of the defendant in that the prayer for a stay of all proceedings was also applied for under the inherent jurisdiction of the court. Again based on the reasoning given in *Bank Utama (Malaysia) Bhd v. Hectares Pacific Sdn Bhd & Ors (supra)* at p. 106 there is no basis for making the application *ex parte*: G

A perusal of the second defendant's application shows that it was made under "O. 12 r. 6 and/or O. 92 r. 4 of the Rules of the High Court 1980" and so I shall proceed to consider whether the order of stay was properly made under O. 92 r. 4 RHC, which states that: H

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court. I

To begin with, it is my view that O. 92 r. 4 is couched in sufficiently wide language to enable a court, in appropriate circumstances, to grant an order for stay of proceedings. In J*aya Harta Realty Sdn Bhd v. Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd; Tetuan Isharidah, Ho, Chong & Menon (Garnishee)* [2000] 3 CLJ 361 Vincent Ng J thought so as well when he said at p. 367:

> A further distinction to note is that in stay of proceedings cases the Court's inherent jurisdiction is invoked, whereas applications for stay of execution of judgment are, in our High Courts, governed by a specific provision, being O. 45 r. 11 of the Rules.

And in *Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd* [1999] 4 CLJ 533, his Lordship Gopal Sri Ram JCA said at p. 541:

> Since the circumstances in which the Court's process may be abused are varied and numerous, the categories of such cases are therefore not closed. Whether the institution of an action or its continuation or a step taken therein amounts to an abuse of process depends upon particular and individual circumstances. Where an action amounts to an abuse of the Court's process, it may be struck out or stayed.

Thus, while I agree with the second defendant that the court can in an appropriate case grant, in the exercise of its inherent jurisdiction, a stay of proceedings, the matter does not end there because in the context of the present application two further questions arise for determination. They are: (a) could the court be moved *ex parte* for a stay of proceedings?; and (b) if so, had the second defendant made out a case for the exercise of the court's discretion in favour of a stay?

**[40]** With respect to (a) his Lordship Clement Skinner J (as he then was) preferred to follow the decision in *Malayan United Finance Bhd, Johore Bahru v. Liew Yet Lan* [1989] 1 LNS 115; [1990] 1 MLJ 317 where VC George J (as he then was) examined the provisions of the RHC generally and some of its rules in particular, to determine what applications may be made *ex parte* to the court:

> The learned judge concluded there that the general rule is that all applications in chambers have to be made by summons *inter partes* other than applications excluded by the rules from being so brought and, therefore, hearing an application *ex parte* when not authorised by the rules would be tantamount to hearing the

application by a procedure independent of the RHC. In the premises I reject the second defendant's contention that an order of stay of proceedings may be applied for on an *ex parte* basis.

**[41]** With that view I gladly associate myself.

**[42]** With respect to (b), all that the defendant here states in its affidavit is that as it is applying to set aside the writ and/or the service of it then further proceedings ought to be stayed. That by itself is not a sufficiently substantive reason for a stay of proceedings. For so long as the appearance remains conditional, no further steps in the proceedings could be taken by the plaintiff as there is no obligation to enter defence until the appearance becomes unconditional. Likewise too the plaintiff could not apply for summary judgment until the appearance becomes unconditional. In short the plaintiff cannot enter judgment in default of appearance or defence against the defendant and neither could the plaintiff file an application for summary judgment. There is therefore nothing that the defendant needs to fear that would justify a stay of proceedings against the defendant.

**[43]** I therefore hold that no stay of proceedings should have been ordered by the SAR either under O. 12 r. 6 or 7 RHC or even under the inherent jurisdiction of the court.

## Pronouncement

**[44]** This court finds that the *ex parte* order of the SAR (encl. 11) that contains not just an extension of time to 29 January 2010 for the defendant to file its application to set aside the writ and/or the service of it but also a stay of all proceedings against the defendant ought to be set aside for the reasons given above. The said impugned order made *ex parte* by the SAR was irregularly obtained and in any event the application lacks merits. The SAR was right in setting aside the whole of the said order on 13 January 2011.

**[45]** The defendant's appeal is thus dismissed with costs of RM1,000. If at all there was a basis for an extension of time and a stay of all proceedings, which I found none, such an application ought to have been made *inter parte*.